UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2014 MSPB 38

Docket No. NY-0752-12-0099-I-1

Marytherese Miller,

Appellant,

v.

Department of the Army,

Agency.

May 30, 2014

Peter Cresci, Esquire, Bayonne, New Jersey, for the appellant.

Michael R.S. Donaghy, Esquire, Devens, Massachusetts, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 This case is before the Board on the agency's petition for review of the initial decision that reversed the appellant's removal. For the reasons set forth below, the Board GRANTS the agency's petition and REVERSES the initial decision. The appellant's removal is SUSTAINED.

BACKGROUND

¶2 As found by the administrative judge, the essential facts about the appellant's duties are not in dispute. Initial Appeal File (IAF), Tab 56, Initial Decision (ID) at 2-3. As a GS-7 Legal Technician at the U.S. Military Academy

at West Point, New York, the appellant provided administrative and technical support for cadet misconduct and honor hearings, including recording and transcribing those hearings. ID at 2; IAF, Tab 7 at 23-28 of 80. Uncontested honor hearings and misconduct hearings are held in the Office of the Staff Judge Advocate (OSJA) courtroom, adjacent to the appellant's office. ID at 2; IAF, Tab 7 at 26 of 80. Contested honor hearings were historically held on the fourth floor of Nininger Hall, a building that has no elevator. ID at 2. The appellant's position description requires that she be able to carry recording equipment weighing 20-30 pounds while climbing stairs so that she can record and transcribe honor hearings "on the fourth floor of a historical building with no elevator." IAF, Tab 7 at 26 of 80.

¶3 As a result of an injury the appellant sustained to her left knee, the agency, in 2005, approved her informal request for a reasonable accommodation, specifically that, when she was assigned to a contested honor hearing, it would be held in the OSJA courtroom, rather than Nininger Hall. *See* ID at 3. In November 2006, the agency directed the appellant to make a formal accommodation request, which she did, and the agency granted it, permitting her to continue recording and transcribing those contested honor hearings that were assigned to her in the OSJA courtroom. IAF, Tab 7 at 63-64 of 80; ID at 3-4. The accommodation continued until the end of 2009. IAF, Tab 7 at 55 of 80; *see* ID at 4.

¶4 In January 2010, the agency notified the appellant that, due to a "recent mission requirement," contested honor hearings would no longer be held in the OSJA courtroom, and, as a result, her accommodation would have to be modified. *Id.* at 61-62 of 80; ID at 4. The agency offered the appellant several modifications to her accommodation, including providing various forms of assistance to enable her to conduct those hearings in Washington Hall, a building with an elevator, and later assignment to a GS-6 position, but the appellant found none of these acceptable, claiming that she must be allowed to continue recording

and transcribing contested honor hearings in the OSJA courtroom. ID at 4-6. Ultimately, the agency required the appellant to undergo a fitness-for-duty examination pursuant to which she was found disqualified from her Legal Technician position based on her stated medical limitations. IAF, Tab 7 at 17 of 80; ID at 5.

¶5 On November 4, 2011, the agency proposed to remove the appellant based on a charge of inability to perform her government duties due to a medical condition and her subsequent declination of an alternative job offer that would accommodate her medical condition. IAF, Tab 7 at 93 of 113. Although granted an extension of time in which to do so, the appellant did not provide a substantive oral or written reply to the proposed removal. *Id.* at 107 of 113. In a January 19, 2012 decision letter, the agency found that the charge was sustained, warranting the appellant's removal to promote the efficiency of the service. *Id.* at 108 of 113.

¶6 On appeal, the appellant challenged the charge and alleged disability discrimination, retaliation for protected equal employment opportunity (EEO) activity, and harmful error. *Id.*, Tabs 1, 45. After convening the requested hearing, the administrative judge issued an initial decision finding the charge not sustained and reversing the removal action. ID at 1, 23. She found that the appellant proved her claim of disability discrimination, ID at 10-19, but failed to prove that the agency's action was in retaliation for her protected EEO activity.[1] *Id.* at 20-22. The administrative judge ordered the agency to cancel the removal,

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[1] The appellant has not challenged the administrative judge's finding that she did not establish her claim of retaliation for protected EEO activity, and we will therefore not disturb it. Moreover, although the appellant's claim of harmful procedural error was listed as an issue in the summary of prehearing conference, IAF, Tab 45, the administrative judge did not address it in the initial decision. Because the appellant has not challenged that issue by filing a petition for review, we will not address it.

restore the appellant to duty, pay her back pay, and provide her interim relief, if either party filed a petition for review of the initial decision. *Id.* at 23-25.

¶7 The agency has filed a petition for review, Petition for Review (PFR) File, Tab 1, to which the appellant has responded, *id.*, Tab 3, and the agency has filed a reply to the appellant's response, *id.*, Tab 4. The appellant has also moved to dismiss the agency's petition for review for failure to comply with the administrative judge's interim relief order. *Id.*, Tab 3.

ANALYSIS

The Board will not dismiss the agency's petition for review for failure to comply with the interim relief order.

¶8 The initial decision ordered the agency to provide the appellant with interim relief pursuant to 5 U.S.C. § 7701(b)(2)(A), effective the date of the initial decision, if a petition for review was filed. ID at 24-25. Under 5 U.S.C. § 7701(b)(2)(A), the agency must show, at a minimum, that it has appointed the appellant to a position carrying the proper title, grade, and rate of pay, and that the appointment was effective as of the date of the initial decision. *See Powell v. U.S. Postal Service*, 90 M.S.P.R. 358, ¶ 3 (2001). The agency submitted evidence showing that it gave the appellant an interim appointment to her GS-7 position, effective the date of the initial decision. PFR File, Tab 1 at 8. The appellant argues that the agency failed to provide a sworn certificate of compliance with the interim relief order, failed to make an undue disruption determination, and has not paid her "properly" from the date of the initial decision forward. *Id.*, Tab 3 at 2 n.1. The appellant also states that she "is not allowed to work as a Legal Technician." *Id.* at 2 n.1.

¶9 The agency, under the signature of its duly authorized representative, stated that it certified its compliance with the administrative judge's interim relief order. *Id.*, Tab 1 at 4. The SF-50 the agency submitted showing that the appellant was returned to her position of record suggests that the agency did not

deem it necessary to make an undue disruption determination under 5 U.S.C. § 7701(b)(2)(A)(ii). *Id.*, Tab 1 at 8. The appellant's unsubstantiated claims that she is not allowed to work in her position and that she has not been paid properly from the date of the initial decision forward are too vague to constitute a challenge to the agency's evidentiary showing. *See id.*, Tab 3.

¶10 Moreover, even if an agency fails to establish its compliance with an interim relief order, the Board may, but need not, exercise its discretion to dismiss the agency's petition. *Guillebeau v. Department of the Navy*, 362 F.3d 1329, 1332-34 (Fed. Cir. 2004). Under the circumstances of this case, we find that any alleged shortcomings in the agency's showing of compliance are not sufficiently serious to warrant dismissal of the agency's petition for review, and we exercise our discretion not to invoke that sanction. *See, e.g., Stack v. U.S. Postal Service*, 101 M.S.P.R. 487, ¶ 6 (2006).

The agency proved the charge of inability to perform.

¶11 Where, as here, the appellant does not occupy a position with medical standards or physical requirements or subject to medical evaluation programs, to establish a charge of physical inability to perform, an agency must prove a nexus between the employee's medical condition and observed deficiencies in her performance or conduct or a high probability, given the nature of the work involved, that her condition may result in injury to herself or others.[2] *Fox v. Department of the Army*, 120 M.S.P.R. 529, ¶ 25 (2014). In determining whether the agency has met its burden, the Board will consider whether a reasonable accommodation exists that would enable the employee to safely and efficiently perform the core duties of the position. *Id.* In finding the charge not sustained, the administrative judge found that the appellant could perform without

[2] The administrative judge noted that the agency did not argue in this case that there was a reasonable probability of hazard such that the appellant's condition could have resulted in injury to herself or others. ID at 9.

accommodation all the functions of her position, except for the recording and transcribing of contested honor hearings, but that she could perform that function with the reasonable accommodation of being allowed to record and transcribe those hearings in the OSJA courtroom as she has done since 2005. ID at 8.

¶12 The agency argued that, in 2010, the new Commandant of Cadets determined that contested honor hearings would no longer be held in the OSJA courtroom out of a concern that holding such hearings in close proximity to the legal office made the proceedings more formal and legalistic. Based on that decision, the agency undertook numerous measures to modify the appellant's long-standing accommodation, but she refused them all. As set forth more fully below, we find that the evidence supports the agency's position and that, because the appellant cannot, or will not, perform the core duties of her position with the reasonable accommodation offered by the agency, the charge of inability to perform is sustained. Removal for physical inability to perform under these circumstances promotes the efficiency of the service. *Jackson v. U.S. Postal Service*, 666 F.2d 258, 260 (5th Cir. 1982); *D'Leo v. Department of the Navy*, 53 M.S.P.R. 44, 51 (1992).

The appellant did not establish that the agency discriminated against her by failing to accommodate her disability.

¶13 An agency is required to make reasonable accommodation to the known physical and mental limitations of an otherwise qualified individual with a disability unless the agency can show that accommodation would cause an undue hardship on its business operations. 29 C.F.R. § 1630.9(a). Reasonable accommodation includes modifications to the manner in which a position is customarily performed in order to enable a qualified individual with a disability to perform the essential job functions. Equal Employment Opportunity Commission (EEOC) Notice No. 915.002, *Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act* (Oct. 17, 2002) (EEOC Guidance), *available at*

http://www.eeoc.gov/policy/docs/accommodation.html.[3] In order to establish disability discrimination, an employee must show that: (1) she is an individual with a disability, as defined by 29 C.F.R. § 1630.2(g); (2) she is a qualified individual with a disability, as defined by 29 C.F.R. § 1630.2(m); and (3) the agency failed to provide a reasonable accommodation. *Emory v. Jackson*, E.E.O.C. Appeal No. 0120112078, 2013 WL 3435860, at *9 (E.E.O.C. June 27, 2013).[4]

¶14 The administrative judge found that the appellant is an individual with a disability based on her testimony and supporting medical evidence showing that her medical impairment to her left knee significantly restricts her ability to walk, stand, and climb, substantially limiting her in those major life activities. ID at 12-14. The agency has not challenged that finding, and we discern no basis upon which to disturb it. Assuming without deciding that the appellant also established that she is a qualified individual with a disability under 29 C.F.R. § 1630.2(m), i.e., that she can perform the essential functions of her position with or without accommodation, we now address whether the appellant established that the agency violated its duty of reasonable accommodation.

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[3] As a federal employee, the appellant's claim of disability discrimination arises under the Rehabilitation Act. However, the standards under the Americans with Disabilities Act (ADA) have been incorporated by reference into the Rehabilitation Act. 29 U.S.C. § 791(g). Further, the ADA Amendments Act of 2008 (ADAAA), Pub. L. No. 110-325, 122 Stat. 3553 (codified at 42 U.S.C. §§ 12101 et seq.), applies to this appeal because the incidents in question occurred after the January 1, 2009 effective date of the ADAAA. Although the ADAAA changed the interpretation of the law with respect to the existence of a disability, it did not affect the requirements of the law as to reasonable accommodation. *See Davis v. U.S. Postal Service*, 119 M.S.P.R. 22, ¶ 11 n.4 (2012).

[4] The Board generally defers to the EEOC on issues of substantive discrimination law unless the EEOC's decision rests on civil service law for its support or is so unreasonable that it amounts to a violation of civil service law. *Southerland v. Department of Defense*, 119 M.S.P.R. 566, ¶ 20 (2013).

¶15 An individual with a disability may request a modification to the work environment or adjustments in how and when a job is performed, due to a medical condition. However, this request does not necessarily mean that the employer is required to provide the requested accommodation or adjustment. A request for reasonable accommodation is the first step in an informal, interactive process between the individual and the employer. EEOC Guidance (Requesting Reasonable Accommodation) (Q&A item 1). "The appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the individual with a disability." Appendix to 29 C.F.R. Part 1630, § 1630.9. Courts have generally required the parties to engage in this process in good faith. *See, e.g.*, *Rehling v. City of Chicago*, 207 F.3d 1009, 1015-16 (7th Cir. 2000); *see also Simpson v. U.S. Postal Service*, 113 M.S.P.R. 346, ¶ 18 (2010) (finding that the appellant did not prove the denial of reasonable accommodation where he was unresponsive to the agency's good faith attempts to engage in the interactive process).

¶16 In this case, after advising the appellant that it had been determined that contested honor hearings would no longer be held in the OSJA courtroom, the agency offered her an alternative accommodation whereby she would record and transcribe contested honor hearings in Washington Hall's Red Reeder Room. IAF, Tab 7 at 61-62 of 80. The agency believed that the appellant's restrictions would be accommodated because Washington Hall has an elevator. The agency also offered the appellant a parking pass, informed her that she would not have to carry any recording equipment, as the OSJA would ensure that such equipment would be in the Red Reeder Room on the days of her scheduled hearings, and offered to modify her work schedule by allowing her to have a later start time on those days. *Id.* According to the appellant, she attempted to negotiate the steep incline at the entrance of Washington Hall, but encountered difficulty, aggravating her knee. Hearing Compact Disc (HCD), Appellant's testimony. The agency then proposed a modification to the previous accommodation, offering to

purchase a mobility scooter for the appellant to insure that she would not injure herself trying to negotiate the ramp at Washington Hall. IAF, Tab 7 at 57-58 of 80. The agency scheduled three appointments for the appellant to visit a scooter store so that she could be trained and fitted with a scooter, but she indicated that she did not intend to appear at any of the appointments and, in fact, did not do so. *Id.* at 37-46 of 80.

¶17 In August 2010, the appellant submitted a medical document indicating that she could not climb stairs, walk long distances, walk on inclines, or engage in prolonged standing. IAF, Tab 7 at 50-52 of 80. These restrictions had been in place for some time. *See, e.g.*, *id.* at 65 of 80; Tab 50, F-20, F-28, F-30. However, the document submitted in August 2010 also stated "no mobility assistance scooter at this time." *Id.*, Tab 7 at 50 of 80. Because the document provided no medical basis for this statement, the agency unsuccessfully sought further information from the appellant's physician regarding the viability of the scooter. *Id.* at 48 of 80. On December 17, 2012, the agency reviewed all of the documentation and determined that the appellant had refused the proposed modification of her accommodation by rejecting the mobility scooter offered to her. *Id.* at 33-34 of 80.

¶18 On March 4, 2011, the agency notified the appellant that she was required to undergo a fitness-for-duty examination as it appeared that she was unable to access either of the authorized locations for contested cadet honor hearings. *Id.* at 20 of 80. The examination determined that she was disqualified for further assignment to her present position based on her stated medical limitations. *Id.* at 17 of 80. Because the appellant had declined a reasonable accommodation, that is, use of a scooter, the agency advised her that it would conduct a job search for a full-time permanent position for which she was qualified and which was within her medical limitations. *Id.* at 16 of 80. In August 2011, having not found an eligible position at the appellant's current grade level of GS-7, the agency offered her the position of Legal Assistant, GS-6, with pay retention. *Id.* at 12 of 80.

She was advised that, if she failed to respond to the offer within 7 days of her receipt of it, the agency would initiate procedures to remove her. *Id.* at 13 of 80. The appellant neither accepted nor declined the offer. *Id.* at 9 of 80.

¶19 Based on the above, we find that the appellant failed to engage in good faith in the interactive process. Rather, at each step of the way, she rejected or circumvented the agency's proposed and then revised offers, based on her own seemingly subjective belief that she could only be accommodated by continuing her old accommodation, absent any proof that this was the case. Although the appellant's physician indicated in August 2010 that she could not use a mobility assistance scooter "at this time," *id.* at 50 of 80, he testified at the hearing that he "regretted" putting that restriction on the form and that he was not aware of any medical reason why the appellant could not use a mobility assistance scooter. ID at 5 n.2; HCD, Delbello testimony. Moreover, in a form the appellant's doctor completed on her behalf on September 8, 2011, he stated that the appellant "may use scooter to go up and down ramp." IAF, Tab 50, F-3, F-5.

¶20 In addition, we note that during the proceeding below the agency submitted a copy of a court decision involving the appellant which bears on the reasonable accommodation issue, specifically, a September 14, 2011 decision of the U.S. District Court for the Southern District of New York in *Miller v. McHugh*, 814 F. Supp. 2d 299 (S.D.N.Y. 2011). IAF, Tab 7 at 25-72 of 113. In that case, the judge granted the agency's motion for summary judgment, finding it undisputed that the appellant declined an accommodation to help her travel to Washington Hall and that, because that location was handicapped accessible, she did not raise a triable issue of fact as to whether the agency failed to reasonably accommodate her. *Id.* The agency's efforts to reasonably accommodate the appellant at Washington Hall in this case and in the district court case evolve from the identical set of facts and from the same time period. The other criteria for the application of collateral estoppel are also present. *See Gossage v. Department of Labor*, 118 M.S.P.R. 455, ¶ 13 (2012) (stating that collateral estoppel, or issue

preclusion, is appropriate when: (1) an issue is identical to that involved in the prior action; (2) the issue was actually litigated in the prior action; (3) the determination on the issue in the prior action was necessary to the resulting judgment; and (4) the party against whom issue preclusion is sought had a full and fair opportunity to litigate the issue in the prior action, either as a party to the earlier action or as one whose interests were otherwise fully represented in that action); *see also Kroeger v. U.S. Postal Service*, 865 F.2d 235, 239 (Fed. Cir. 1988). We find, therefore, that the administrative judge erred in not invoking the doctrine of collateral estoppel to find that the agency reasonably accommodated the appellant based on the district court case.

¶21 If more than one accommodation will enable an individual to perform the essential functions of her position, the preference of the individual with the disability should be given primary consideration, but the employer providing the accommodation has the ultimate discretion to choose between effective accommodations. Appendix to 29 C.F.R. Part 1630, § 1630.9. Under the circumstances, we find that the appellant failed to establish that the agency violated its duty of reasonable accommodation because she was not entitled to the accommodation of her choice and because the agency acted within its discretion to offer her reasonable and effective accommodations, all of which she declined.

The agency-imposed penalty of removal falls within the limits of reasonableness.

¶22 The Board has held that the standard to be applied in cases involving removal for inability to perform is whether the penalty of removal exceeded "the tolerable limits of reasonableness." *Marshall-Carter v. Department of Veterans Affairs*, 94 M.S.P.R. 518, ¶ 14 (2003), *aff'd*, 122 F. App'x 513 (Fed. Cir. 2005). The record reflects that the appellant's medical condition required long-term recovery and rehabilitation without a foreseeable end to her incapacity. Further, the medical documentation provided to the agency, which was often conclusory, did not support the appellant's ability to return to duty. After offering the appellant several forms of reasonable accommodation, but before imposing

removal, however, the agency took the additional step of offering her a lower-graded position with saved pay. *Cf. Marshall-Carter*, 94 M.S.P.R. 518, ¶ 14 (an agency did not abuse its discretion when assessing the reasonableness of the penalty by failing to consider reassignment as an alternative to removal, where the appellant refused to cooperate with the agency's attempts to determine the extent of her physical limitations). In addition, we have pointed out that the appellant has certain obligations during the interactive reasonable accommodation process and that the penalty of removal may be justified where the appellant falls short of those obligations. *Jackson v. U.S. Postal Service*, 79 M.S.P.R. 46, 54 (1998) (removal for physical inability to perform sustained where appellant failed to identify any vacant funded positions at or below her grade level the duties of which she could perform) (citing *Gonzagowski v. Widnall*, 115 F.3d 744, 748-49 (10th Cir. 1997); *Shiring v. Runyon*, 90 F.3d 827, 832 (3d Cir. 1996); *Robinson v. Runyon*, 987 F. Supp. 620, 622 (N.D. Ohio 1997)).

¶23 Consistent with *Marshall-Carter*, and in light of the appellant's repeated refusals to accept any of the agency's numerous offers of reasonable accommodation, we find, under the circumstances, that the penalty of removal falls within the tolerable limits of reasonableness.[5] *See Beard v. General*

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[5] With its petition for review, the agency has submitted a copy of a February 27, 2013 decision of a New York State Unemployment Insurance Appeal Board administrative law judge denying the appellant unemployment benefits on the basis that she voluntarily quit her job without good cause at the agency. PFR File, Tab 1 at 9-11. Specifically, the administrative law judge found that, because the appellant declined the agency's offer of a lower-graded position, she was disqualified from receiving benefits. *Id.* at 11. The unemployment benefits decision was issued after the initial decision in this case, and therefore it is new evidence. *See Avansino v. U.S. Postal Service*, 3 M.S.P.R. 211, 214 (1980). However, while unemployment compensation decisions are worthy of consideration, they are not dispositive. *Cirella v. Department of the Treasury*, 108 M.S.P.R. 474, ¶ 19, *aff'd*, 296 F. App'x 63 (2008). Because, in applying the principle of *Marshall-Carter* to the circumstances presented in this case, we have found that the agency did not need to consider the appellant for other positions as an alternative to removal, the unemployment compensation decision is not material. *See Russo v. Veterans Administration*, 3 M.S.P.R. 345, 349 (1980). We therefore deny the

Services Administration, 801 F.2d 1318, 1322 (Fed. Cir. 1986) (when an agency's penalty is not unreasonable, it must be accorded deference by the Board).

ORDER

This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request further review of this final decision.

Discrimination Claims: Administrative Review

You may request review of this final decision on your discrimination claims by the Equal Employment Opportunity Commission (EEOC). *See* Title 5 of the United States Code, section 7702(b)(1) (5 U.S.C. § 7702(b)(1)). If you submit your request by regular U.S. mail, the address of the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 77960
Washington, D.C. 20013

If you submit your request via commercial delivery or by a method requiring a signature, it must be addressed to:

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appellant's request, filed 8 months after the close of the record on review, to submit a copy of a decision which, she contends, reversed the administrative law judge's decision. PFR File, Tabs 7, 6.

Office of Federal Operations
Equal Employment Opportunity Commission
131 M Street, NE
Suite 5SW12G
Washington, D.C. 20507

You should send your request to EEOC no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. See 5 U.S.C. § 7703(b)(2). You must file your civil action with the district court no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of

prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e-5(f) and 29 U.S.C. § 794a.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.